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IN THE
Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT, *Petitioners*,
v.
MICHAEL A. NEWDOW, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF COMMON GOOD FOUNDATION, YOUR CATHOLIC VOICE FOUNDATION, AND THE NATIONAL CLERGY COUNCIL IN SUPPORT OF PETITIONER

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INTREST OF *AMICI CURIAE*[*]

Amicus Curiae, the *Common Good Foundation* is a not for profit foundation committed to the mission of the Common Good Movement: the advancement of true social justice, the protection of human rights, and the promotion of the Common Good. Common Good Foundation is committed to education, motivation, and ministry proceeding from its four pillars of participation: the dignity of life, primacy of the family, authentic human freedom, and solidarity with the poor.

Amicus Curiae, Your Catholic Voice Foundation is the educational and evangelical outreach of the Your Catholic Voice movement: a movement of faithful Catholic citizens serving the common good. Your Catholic Voice Foundation is dedicated to the social teaching of the Catholic Church and serves its mission through four pillars of participation: the dignity of life, primacy of the family, authentic human freedom, and solidarity with the poor.

Both Common Good Foundation and Your Catholic Voice are recognized as tax-exempt 501(c) (3) organizations under the Internal Revenue Code.

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[*] Pursuant to Rule 37.3(a) of the Rules of this Court, *Amici* have obtained and lodged the written consents of all parties to the submission of the *Amici Curiae* brief. Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person, other than *Amici* and its counsel, made a monetary contribution to the preparation or submission of this brief.

[*] Counsel wishes to acknowledge the work of the Director of Research for the Common Good Legal Defense Fund, Isaiah Kalinowski on this brief; as well as the editorial assistance of George and Peter Dillon of Common Good Foundation.

Amicus Curiae, the *National Clergy Council* is a network of Christian leaders drawn from all traditions including Catholic, Evangelical, Orthodox, and Protestant clergy, members of religious orders and societies, religious educators, journalists, lawyers, and heads of para-church organizations. They are dedicated to bringing classical Christian moral instruction into liscourse on public policy.

SUMMARY OF THE ARGUMENT

The American idea of unalienable human rights, endowed by a Creator (and not conferred by a civil government), is unique in human history. Its application of delegated powers, derived from the people, to be exercised with accountability by their freely elected representatives in order to secure, defend, and support these rights, was also a unique model of governance at the time of the founding.

The greatest protection for the continued existence of these unalienable rights is our agreement that they are an "endowment", and are therefore not conferred by a civil authority. These rights are given by a Creator; therefore they are fundamental human rights and not simply "civil" rights. They pre-existed any formal governmental structure. These rights were not granted or conferred by any state to its citizens but are instead to be protected and defended b, the State; they secure our freedom as a people and form the moral basis of any truly free society.

The very ideas of personhood, family and community governance predate the formation of any nation state. The autonomy which the Creator endows upon each individual person and the inherent authority given to the institution of the family, provides a framework from which Americans may cede authority to the state in an effort to create an ordered society which is constantly in pursuit of providing for the common good.

The very notion that individuals are endowed with basic unalienable human rights, gives meaning, life and substance to America's vision of self-governance. These rights are written in the order of nature, and they flow from Nature's God, an acknowledged authority that grants, validates and guarantees them. If this source of our rights and liberties is not absolute in its existence then the very premise for our American vision is non-existent.

The affirmation that the source of these rights is a Creator and not a civil authority is an essential element of America's founding documents, either explicitly, as in the Declaration of Independence, or implicitly as in the Constitution. It is also passed on through America's cultural and civic expressions, practices, and polity. These all exist in order to affirm and to communicate these unalienable human rights to succeeding generations and thereby secure their continuance as the foundation of the American experiment.

The Declaration of Independence and the United States Constitution both reflect the core American belief in the sovereignty of the people to choose their own form of government, as well as the conviction that the source of our rights is greater than that chosen government. Both beliefs are vital to the continuance of the American experiment. The uniquely American belief that all men and women are endowed with basic unalienable human rights is the cornerstone of an American government that is designed to function by the people and for the people. This belief is the essential principle by which those who govern America are ultimately prevented from invading or usurping American's fundamental human rights.

This framework for governance logically precludes atheism as a State affirmation or a foundational basis for any system of inviolable and unalienable rights. The recognition

of a basic monotheism reinforces our guaranteed freedoms, it does not infringe upon them. Ironically, the freedom that logically flows from the premise that we are endowed with unalienable human rights also safeguards an individual's choice to ascribe to atheism along with any other form of guiding philosophy or religion.

The proper understanding of individual liberty respects individual free will and with it the choice to delegate authority to properly elected officials or governmental authorities. As social beings, we are born into the first society, the human family. For those who accept a religious tradition, they assign a portion of delegated authority to that community of faith and its doctrine and guiding governance in their lives. Finally, because we live together in a free society, we choose to assign or delegate a portion of authority to the civil government at its various levels, in an effort to maintain an ordered society firmly rooted in promoting the common good.

In the United States, we further divide that portion of civil authority, based upon a concept of federalism, between the federal government and the governments of the several states. The reason for this division is to grant less authority to the federal government, not more, and to thus apply a principle of subsidiarity to the process. America's forefathers did this in an effort to ensure that governance occurs primarily at a level closest to those being governed.

These diverse spheres of delegated authority are often exclusive, and the First Amendment's religion clauses embody and order their relationship towards a full application of the Constitution. However, the First Amendment's purpose is to limit the power that may ever be delegated to the government not to constrain the free, voluntary action of individuals. Civil governments exist to foster human rights, which can only result from individuals'

freedom to make volitional moral choices. The First Amendment was seen as necessary to ensure the security of this crucial freedom, the freedom of conscience.

Only a misconception of the First Amendment would place it in opposition to the voluntary recital of the Pledge of Allegiance. The Pledge is a restatement of our uniquely American ideology that men and women are endowed with natural and unalienable human rights. From the equality illustrated by "liberty and justice for all," to the unity of our component members in spite of serious differences, articulated in "one nation" and "indivisible", the Pledge has stood the test of time and should not now be altered. The phrase now in dispute, "under God," simply embodies our notion of unalienable rights endowed by a Creator that no one, whether acting with brute force or under color of law, may ever infringe.

If this Court grants Respondent's efforts to judicially excise this phrase from the Pledge of Allegiance it will undermine the foundational guarantee of any rights outside of what the State deems fit to grant; including Respondents own right to refuse to recite the Pledge or that clause that he finds so repugnant, "under God." The removal of this phrase is not required by any reasonable application of current Establishment Clause jurisprudence. This case presents this Honorable Court with the opportunity to clarify this often confused and highly contradictory area of Constitutional Law.

ARGUMENT

I. The danger of unbounded governmental power necessitates the protection of endowed unalienable human rights as a limit on potential governmental coercion over individuals.

The historical record of Nation-States, organizational systems for community relations and forms of government, abounds with examples of oppressive governmental coercion and the abuse of enforcement power and reinforces the necessity of the protection of unalienable human rights. On occasion, comparatively "free" societies sprung up in the timeline of history, but they were few, vulnerable, and short-lived, such as the Greek city-states and the early Roman Republic.[1]

Despite the few prominent examples in history books, most governments, before the Modern age, lacked the logistical capability to enforce a government's control over religious worship, expression or speech. Although concepts of unalienable rights and personal freedom were subject to being curtailed through coercion, this coercive control was rarely absolute because the authorities had little ability to actually reach into the personal and familial lives of subjects. When it constrained an individual, it was generally control of his or her physical person and their liberty of free movement.

In our modern context, an abuse of technology could enable unchecked governments to acquire a stranglehold on individuals previously unattainable by governments of the

[1] THE FEDERALIST NO. 9 (Alexander Hamilton). "It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy."

past. For this reason, one of the challenges of modern political thought has been to describe what the outer limits of governmental power *should* be, since those who govern are no longer restrained by a lack of capacity to control. Therefore, an absolute basis of unalienable human rights must exist to counter a potentially unbounded government power.

A. Through the progression of history, and across cultural boundaries, societies came to realize their own unique concept of theism, and established their cooperative relationship with a higher being.

America's unwavering belief in monotheism has manifested itself politically through the delegation of specific authority to separate branches and levels of government in order to preserve individual rights beyond any centralized government's improper curtailment.[2] As Western civilization advanced political theory, it acknowledged the logical necessity of monotheism as the source and foundation of individual human rights. Plato recognized this aspect in his condemnation of the Olympian pantheon in favor of "The One", as did Aristotle in his explanation of the "Unmoved Mover" as creator and animating force. The universe craves an absolute authority as Creator and Judge as a basis and source of law in order both to explain and to govern physical phenomena and social dynamics.

Early on, progressive peoples and cultures realized and accepted this logical necessity, and eventually such a belief replaced primitive, polytheistic animism and hero-worship. Throughout history, the world's advanced cultures have affirmed the importance of recognizing a single,

[2] THE FEDERALIST NO. 47 (James Madison). "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

supernatural creator. Though differences may have arisen on particulars, such as the Creator's involvement or incorporation into the real world or material universe, this Divine Power always manifested itself as a higher authority. Recognition of a single and divine entity and its relationship to governmental processes was essential to those societies' advancement of individual human rights even if individuals could not agree upon specific roles or theologies.

B. The United States stands unique in history by emphasizing the relationship between an individual person and a Creator in order to promote a system of unalienable rights.

The founders of the United States recognized and respected the primacy of the relationship between Creator and creation: "We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance."[3] The relationship between individual members of a societal community was also of the utmost importance. Sovereignty is ultimately vested in the people, and government is instituted by the consent of the governed in order to protect, defend, and establish unalienable rights endowed by a Creator. "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself."[4]

Under this hierarchical structure of relationships, the original relationship between God and humankind should not be violated by overreaching derivative relationships, such as that between the individual and the government.

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[3] James Madison, *Memorial & Remonstrance Against Religious Assessments*.
[4] School District of Abington v. Schempp, 374 U.S. 203, 213 (1963).

Furthermore, "religious beliefs worthy of respect are the product of free and voluntary choice of the faithful." [5] The premises throughout our Constitution thereby reassert the basic dignity of the individual human person and their rights.[6] The free will of each individual to make rational choices on behalf of one's own life, liberty, and pursuit of happiness is central to the American understanding of freedom.[7] A respect for the human person appears sporadically in history, and is the kernel of any true humanism, rightly understood. This respect, which flows from an understanding of the relationship between an individual and their creator, ironically, provides protection to those who chose not to believe in a superior being.

II. The legislative record and contemporaneous history exhibit the Pledge's clause "under God" as a restatement of an essential monotheism that grounds and guarantees our unalienable rights.

The addition of the phrase "under God" to the Pledge was an affirmation by the American public of a unique monotheistic doctrine that extends protection of human rights to all Americans. American's democratically elected representatives altered the Pledge of Allegiance, at the expressed desire of the people, at a time when our nation's political structures and unique notion of rights had been under assault from various forms of totalitarianism—from Fascism and Naziism, to Communism in particular.

> They see arrayed against this Nation, and the way of life which it represents, a dictatorial policy that recognizes no God and no divinity in man. Under communism, men are mere

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[5] Wallace v. Jaffree, 472 U.S. 38, 53 (1985).
[6] THE FEDERALIST NO. 84 (Alexander Hamilton).
[7] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

cogs on a machine, without rights, without souls, without future, without hope.[8]

Communism compelled Americans to offer up a defense of their foundational understanding of unalienable human rights. Simply put, Americans chose to reaffirm the source of their liberties and individual human rights.

> Our American government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain unalienable rights which no civil authority may usurp. Thus, the inclusion of God in our pledge of allegiance rightly and most appropriately acknowledges the dependence of our people and our Government upon that divinity that rules over the destinies of nations as well as individuals. Furthermore, it sets at naught the communistic theory that the State takes precedence over the individual, and, plainly denies the atheistic and materialistic concepts of communism with its attendant subservience of the individual. [9]

Americans accepted this challenge of self-definition and again affirmed and validated the American concept monotheism and its relationship to individual human rights internationally, through their influence in the United Nations Charter and the Declaration of Human Rights. Americans responded specifically to the Soviet autocracy's enslavement

[8] 100 CONG. REC. 7757 (June 7, 1954) (Pledge of Allegiance Debate, House Joint Resolution 243, 83rd Congress, 2nd session) (Congressman Oliver P Bolton (R-OH) speaking).
[9] *Id.* at 7762 (Congressman Charles A. Wolverton (R-NJ) speaking).

of their own subjects' consciences and deprivation of rights in a variety of ways, not the least of which was through the amendment of our Pledge of Allegiance to include the phrase now objected to by Respondent.

The pledge affirms what is common to all of us by virtue of living as citizens in the United States of America. The Pledge of Allegiance expresses the union of our nation and confirms that, whatever the particular beliefs of each individual may be; each of us has a common bond to the premise of a Creator through the support of our unique system of government.

At the time of the addition of the phrase, "under God", belief in a higher power was not extricable from the central civil creed of American consciousness encapsulated in the Pledge of Allegiance. Rather, such a belief was a necessary constitutive element of our national identity. It was what set us apart, in contradistinction with and opposition to tyrants and coercive atheistic regimes all over the world. Congressman Charles A. Wolverton (R - NJ) agreed:

> The spiritual bankruptcy of the Communists is one of our strongest weapons in the struggle for men's minds and this resolution gives us a new means of using that weapon. The use of the phrase 'under God' in the pledge of allegiance to the flag sets forth in a mere two words, but, very strong and meaningful words, the fundamental faith and belief of America in the overruling providence of God and our dependence at all times upon Him.[10]

[10] *Id.* at 7763.

III. In deciding this case, the Court should distinguish between *Tolerance* of alternate viewpoints and *Incongruity* with our nation's foundational precepts.

From its conception America stood as the epitome of religious tolerance, established through the incorporation of unalienable human rights into its foundational framework. Despite the Christian foundation of our nation, the United States has always been tolerant of diverse religious beliefs including those of atheist. Early American's remained unified despite their various beliefs about our national identity. "Any credo of nationalism is likely to include what some disapprove or to omit what others think essential."[11] Our forefathers remained faithful to this early foundational framework regardless of their personal aspirations for the political structure of our fledgling government.

While our system of government calls us to tolerate diversity and a plurality of beliefs, the nation is not compelled to alter its entire system and structure merely to suit the whimsy of dissidents or the insistence of a minority. "A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution."[12]

A. The Respondent's challenge to the national recognition of a Creator or Higher power threatens the very freedom of conscience that enables him to disagree.

There is no inconsistency in respecting the sincere beliefs of an individual or a minority in disagreement on the existence of a Creator, while nationally recognizing the inherent truth of that Creators existence. So long as divergent factions do not threaten the national security or welfare, they may ascribe to any divergent belief, political,

[11] Barnette at 634.
[12] Lee v. Weisman, 505 U.S. 577, 598 (1992).

religious, or otherwise.[13] They may even organize for the purpose of affecting the body politic in order to both be heard on their issues and to effect change. The history of political parties and lobbies in national politics is rich with examples of minorities who voiced their opinions democratically and made their presence felt in the political institutions of local, State and national legislatures.[14] In all of these examples the denial of a Creator's authority to bestow unalienable rights upon individuals would relinquish the right of minorities to interact with and influence the majority.

Even groups with radically un-American views, such as Racial Supremacists, are granted every right that our system affords as due them. This is precisely because our system of government protects the rights of everyone to individual conscience, expression, assembly, and representation. Clearly, the unalienable freedom of conscience guaranteed by the belief in a Creator provides the basis for tolerance of alternative viewpoints in America.

B. There is no coercion, psychological or otherwise, present in the voluntary recital of the full Pledge of Allegiance.

A voluntary recital of the Pledge of Allegiance does not impinge on a minority's right to abstain from believing in the principles that it is expounding. This Court has reiterated that "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'"[15] Our tolerance of a minority's viewpoint does not require the majority of Americans to dramatically alter our foundational structure and beliefs to suit their individual fancy. They are not thereby coerced, but

[13] THE FEDERALIST NO. 10 (James Madison).
[14] STEVEN J. ROSENSTONE ET AL., THIRD PARTIES IN AMERICA (1996).
[15] Schempp at 225.

rather are free to express their disagreement. Any claims of coercion by atheists are without merit, because adherence to a belief system is not required by the current practice and form of the Pledge of Allegiance. In fact, since *Barnette*, not even avowed allegiance is required from those who dissent to its recital.

Respondent's claim of coercion by proximity is illogical. We live in a pluralist society, where one cannot abide the day without encountering the diverse beliefs and practices of those around us. "No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government."[16] Society and government are not interlopers to be distrusted or feared, but a part of an integrated life. An integrated life may also include religion, if so desired by the individual, and that integration should not be forcibly dissolved by the discomfort of a few. "Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[17]

To preclude the free expression of others under the guise that somehow their very presence exerts moral force upon us amounting to coercion, is to embrace a Hobbesian state of nature. The disapproval of one or a few citizens does not invalidate every state action involved with religion. "People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation."[18] To believe otherwise would be subscription to a perverse idea of individual freedom that ultimately leads to an anarchist form of 'autonomy'. "No well-ordered society can leave to the individuals an absolute right to make final decisions; unassailable by the State, as to

[16] Lynch v. Donnelly, 465 U.S. 668, 673 (1984).
[17] *Id.*
[18] Lee at 597.

everything they will or will not do. The First Amendment does not go so far."[19]

IV. The text of the Pledge of Allegiance requires no contradiction of individual religious beliefs, nor does it undermine the tradition of social tolerance for alternate viewpoints.

An atheist who chooses to join in reciting the Pledge of Allegiance for purely secular motives merely *acknowledges* the American *concept* of ordered liberty through unalienable rights granted by a Creator. In so doing, they do not proclaim individual belief in a Creator or admit personal subordination to any higher power in conflict with their deeply held beliefs. The atheist participant simply recognizes his place in a nation that itself recognizes God as the well-spring of our unalienable human rights, the hallmark of our system of government, and its unique identity in the history of the world.

The text of the Pledge bears this last point out. An individual reciting the text of the Pledge is simply acknowledging their loyalty to the American Republic. The Pledge's clauses are specific affirmations of the nature of this Republic. They restate America's core principles of "liberty" and "justice" and the vital unitive concept of the federal republic in the terms "one nation…indivisible." The drafters of the amendment in question saw the clause "under God" as so foundational to its entirety, that they inserted the clause as a structural, as well as logical link between "one nation" and "indivisible."

These maxims state our nation's self-concept and national identity in much the same way as "E Pluribus Unum" and "In God We Trust" do on our national currency.

[19] Barnette at 643 (Black, J., concurring).

"It is true that religion has been closely identified with our history and government."[20] Recital of the Pledge of Allegiance does no more require personal belief in a monotheistic deity than does the regular use of our currency. These statements are not defunct anachronisms from an unenlightened age; rather they help define our national character and reinforce the values that keep our diverse and pluralist society together, as one nation.

V. The phrase "under God" is not entangling, but rather acknowledges the foundation of our basic human rights.

The Pledge's acknowledgment that we are "One nation, under God" establishes the very foundation of our unalienable human rights. Some might argue that the "under God" clause is empty and unnecessary, and that it has grown meaningless through repetition; therefore no substantial injury is accomplished by its removal, and no relevant interest is harmed by its excision.[21] This argument has no merit. There is a logical necessity for monotheism as a premise to support a system of government based on unalienable human rights not conferred by the State but endowed by a Creator. Therefore, the presuppositions embodied in a system of monotheism are essential to an individual's personal liberty regardless of their acknowledgement of a creator.

As enlightened progressives in America have reasoned, an omnipotent Creator/Judge of all must exist beyond humankind. Otherwise, our rights are not unalienable. Without prior relationships with God and community, our government would be obligated to guarantee only those freedoms and rights that are not swallowed by the capricious appetite of an autocratic sovereign. We would then

[20] Schempp at 212.
[21] *See, e.g., id.* at 303 (Brennan, J., concurring).

surrender all to the Hobbesian Leviathan for the sake of citizenship privileges.

Only the knowledge that we are all subject to an eternal Sovereign provides a check on unmitigated prerogative of a political system over its people. If an individual were to assert a reserved right, whose jurisdiction was not delegated to the constituted government, the individual would remain unavailing against the arbitrary whim of unchecked power. Individuals would have no independent identity for redress of grievances.

Knowledge of the fact that we are all "under God" protects the rights of all from incursion by a sovereign government. Furthermore, a nationwide insistence on atheism is logically inconsistent with our concept of unalienable rights. An individual may hold atheistic beliefs and still be a patriotic American citizen, with all the rights, privileges, and protections that such citizenry provides. Even though, atheism does not comport with the fundamental American notion of unalienable human rights, atheist are still protected under the basic structure of this truly American form of government. After all, "[w]e are a religious people whose institutions presuppose a Supreme Being."[22]

Polytheism is as much at odds with American freedom at its root as is atheism. A transcendent reality must be a supreme, absolute reality. If there is more than one God then that factionalism jeopardizes the entire premise of a system of unalienable rights. As Plato reasoned, a bickering Olympiad can only be a human fiction. Justice must rest in a "Philosopher-King" that rules the ordered universe. In order for our basic human rights to remain inviolably absolute, the authority of the guarantor deity must be absolute as well.

[22] Zorach v. Clauson, 343 U.S. 306, 313 (1952).

Monotheism is so foundational to the American political philosophy of government that our political edifice would suffer fatal damage to its structural integrity if this premise were undermined. Our entire body of governing principles presupposes the existence of a higher power as a check on earthly power and a guarantee of the rule of law. As an open society, we can, and we do, welcome atheists and polytheists into our polity.

VI. The clause "under God" is not an unconstitutional establishment of religion that infringes on the freedom of conscience for atheists.

The Pledge's affirmation that America is a nation "under God" extends protection to atheist and monotheist alike, while comporting to a strict interpretation of the Constitution. The method and theory chosen by Respondent to challenge the amendment in question is particularly attenuated. It gravely demonstrates the tragic consequences of sixty years of strained First Amendment jurisprudence. We therefore petition the Court to reconsider its decisions concerning religion and the inconsistent multifarious tests they have created.

A. This Court has repeatedly held that official encouragement of voluntary public recognition of a Deity, under the free exercise of religion, does not constitute a governmental establishment of religion.

This Court has consistently provided the government with the ability to constitutionally encourage voluntary recognition of a singular creator. The First Amendment does not grant a right for individuals to forcibly silence the beliefs and expressions of those they do not agree with pertaining to public speech. This would contradict the language of the Amendment. It is the essence of the First Amendment to allow an individual's voluntary expression of personal

conscience. It does not operate as insurance from exposure to ideas different from one's own. No one is compelled to say the Pledge or to say the phrase to which Respondent objects.

This Court's decision in *Engel v. Vitale* says as much.

> There is . . . nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contains references to Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God.[23]

The "Establishment Clause" is in fact an "anti-Establishment Clause", intended to prevent government coercion to a particular national Church or nationally enforced religious system. The phrase "under God" is no more an establishment of religion than the motto on our coinage "In God we Trust" or our ceremonial invocations of God in the theater of our governmental institutions from our Courts to our legislatures.

B. Government's relationship with religion rightly understood through the lives of individuals and families follows a standard of accommodation, not hostility.

When governmental bodies function in a healthy relationship with religion, both accommodate each other in

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[23] Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962).

their integration with the whole person, and respect each other's spheres of influence in the lives of individuals. When government acts in accord with this understanding, "it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would prefer those who believe in no religion over those who do believe."[24]

Here, however, the excision of the phrase, "under God," in the court below undermines the very understanding of the source of our freedom and liberties which secures our freedom of conscience. As such, it cannot stand.

This Court, in its *Wallace* opinion, quoted and validated the 1940 *Cantwell v. Connecticut* opinion: "Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion."[25] Then the *Wallace* Court "identified the individual's freedom of conscience as the central liberty that unifies the various Clauses in the First Amendment."[26]

In the *Zorach* opinion, this Court practically applied this "central liberty" to its impact on the relationship between government and religion in the life of the human person: "[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope

[24] Zorach at 314.
[25] Wallace at 50 (quoting Cantwell v. Connecticut, 310 U.S. 296, 303, (1940)).
[26] *Id.*

of religious influence."[27] More than three decades later, this Court followed this forthright standard once more when it held in *Lynch* that "an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court."[28]

C. This case demonstrates the need for a clear test and standard for the application of the First Amendment's Establishment, Free Exercise, and Free Speech clauses.

This Court has the opportunity to provide a consistent reading of the First Amendment's religion clauses and to rectify a presently fluctuating standard of government's relationship with religion. The confusion caused by wavering "constitutional calipers" and other such "tests" in various permutations has caused the confusion that this case exemplifies.[29] We petition this Court to adopt a standard of accommodation, recognizing that religious faith, religious institutions and religious people promote the common good and advance the cause of authentic freedom.

For more than a decade, scholarly observers have noted the fluctuating case-by-case inconsistencies in the legal field of religious expression. "It is time to abandon both the pre-*Weisman Lemon* test and the new psycho-coercion test in favor of a more sane standard of jurisprudence applicable to church-state cases."[30] "The solution is not a simple rewriting of the [*Lemon*] test, but rather a resurrection of an older analysis, one grounded in the history of the Establishment

[27] Zorach at 314.
[28] Lynch at 678.
[29] Tilton v. Richardson, 403 U.S. 672, 677-78 (1971).
[30] Keith A. Fournier, *In the Wake of Weisman: The Lemon Test is Still a Lemon, But the Psycho-Coercion Test is More Bitter Still,* 2 REGENT U. L. REV. 1, 2 (1992).

Clause, congruent with the intent of its authors, and conducive to the fostering of a healthy diversity of speech."[31]

The unfortunate side effect of the various tests, which are seldom unanimously or consistently applied,[32] is that they pit government as an adversary against religion. This promotes an unnecessary hostility between the two which, in turn, requires the individual person to take sides.

"[T]here is surprisingly little textual or historical warrant for the so-called 'strict-separationist' view that the Establishment Clause forbids the states or even the federal government from promoting religion generally or preferring religion to irreligion."[33] Rather than viewing religious adherents as a subversive society of conspirators, governmental entities may instead find it advantageous to see the potential benefit religious faith provides the state in the form of dutiful and responsible citizens. As the Pledge of Allegiance in its entirety exhibits, "the good of religion gives people reason to collaborate…in the political community."[34]

The Lemon test, in all its permutations, seeks foremost to draw a seemingly impenetrable 'wall of separation' between church and state. In the process of doggedly chasing a strict separationist approach, free exercise and personal expression are stifled, and a curious sort of schizophrenia develops between alternate personalities of civic citizen and faithful believer. This kind of hostility toward religion need not, and should not be manifested in a democratic society. The spheres of government and religion in the life of the person do not require complete mutual exclusivity. While some may argue that the institutions and organizational structures of church

[31] *Id.* at 4.
[32] *See* Lee (Brennan, J., dissenting).
[33] ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 132 (1999).
[34] *Id.* at 133-34.

and state may thrive best at a healthy distance, this distinction is best seen as a fence between friendly and accommodative neighbors, and not a wall separating hostile combatants.

CONCLUSION

The Pledge of Allegiance does not mandate a religious belief in God, establish a religion, or constitute a government endorsement of a religion. Rather, it is an affirmation of allegiance to a nation which describes itself as being "under God." If an individual does not believe in God, they can still be a loyal citizen of a republic that does. In fact, America is precisely the kind of nation where citizens may find the greatest protection of the individual liberty to not believe in God specifically because America acknowledges that there are unalienable human rights. When a citizen recites the pledge they pledge allegiance to the flag which stands for "The Republic." There can be no reasonable reading of the history of that Republic that leaves the acknowledgement of the existence of God out of its founding and primary sources. From its very inception "The Republic" has been nurtured and sustained by an acknowledgement of the existence of the "Laws of Nature" and "Nature's God."

The great strides in liberty that form the ongoing history of America's great Republic, from the recognition of the equal rights of men and women to the repudiation of slavery, and the recognition that all are indeed 'created equal" to the encouragement of human rights throughout the world, all owe their very existence to a fundamental idea that there is a higher source of our rights and liberties. For this honorable Court to hold that the United States Constitution prevents school districts from including the Pledge of Allegiance in their educational process undermines the very foundation of authentic human freedom, and denies our history as a free people. Such a rewriting of history is a misapplication of the First amendment would undermine the

very unique balance that is the American experiment in ordered liberty.

Under the foundational American belief that all persons are endowed with unalienable human rights, a parent that does not want their child to recite the Pledge of Allegiance, or the Pledge's phrase "under God" are free to instruct them not to do so. However, under the theory of the Respondent, a parent that wishes to recognize the fundamental character of this nation, the belief in one supreme creator, by allowing their child to state that we are one nation "under God" through the recital of the Pledge is precluded from doing so.

Respondent's claims are without merit, constitutionally, historically, and legally. Furthermore, the Respondent's claims show a serious misunderstanding of the fundamental American principle of freedom and concern for the common good. The Ninth Circuit's decision is a misapplication of any reasoned analysis of this Honorable Court's long standing Establishment Clause jurisprudence. The Pledge of Allegiance, with the phrase "under God" added by the legislature, reflects the will of the American electorate and the historical record of the American experiment. The Pledge's acknowledgment that we are "One nation, under God" comports with the Constitution and is an essential reaffirmation of America's commitment to the preservation of all American's unalienable human rights.

Respectfully Submitted,

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